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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case Nos. 08-13555 (JMP)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

April 13, 2011
2:19 PM

B E F O R E:
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

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PRETRIAL CONFERENCE re Kathleen Arnold and Timothy A. Cotten v.
Lehman Brothers Holdings Inc., et al.

Uvino v. Lehman Brothers Holdings Inc., et. al.:

PRETRIAL CONFERENCE re Defendants' Motion to Dismiss Adversary
Complaint

Transcribed by: Lisa Bar-Leib

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22
23 BY: KATHLEEN ARNOLD and TIMOTHY A. COTTEN, PRO SE

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P R O C E E D I N G S

THE COURT: Be seated, please. I'm sorry for the late start. We had a long calendar this morning, and we didn't end until about 1:40, and we all had to eat. Let's proceed.

MR. BAER: Good afternoon, Your Honor. My name is Lawrence Baer. I'm an attorney at Weil, Gotshal & Manges, here on behalf of the debtor, Lehman Brothers Holdings Inc. I'm here to address the substance of matter number 9 on our amended notice of agenda, and I'd like to introduce my colleagues from our Dallas office who are on the telephone who will be handling the number 8 matter on today's amended agenda. My colleagues in Dallas are Attorneys Ben Stewart, Erin Eckols and Yvette Ostolaza. Matter number 8 is Kathleen Arnold and Timothy A. Cotten, who are pro se versus Lehman Brothers Holdings, et al.

THE COURT: Is anyone here representing the interests of Kathleen Arnold and Timothy Cotten?

MS. ARNOLD: Yes, Your Honor. Yes, sir, I am. Mr. Cotten is here, but I'll -- I'm just going to be the speaker for him.

THE COURT: Okay. Why don't you come forward?

MS. ARNOLD: First of all, Your Honor, I want to make sure we -- we fit --

MS. ECKOLS: Good afternoon, Your Honor. This is Erin Eckols at Weil, Gotshal & Manges on behalf of the debtors, and I have my colleague Ben Stewart also on the line. I have a pro

1 hac in on file for him, and unless Your Honor has an objection
2 we respectfully request that Mr. Stewart be allowed to speak
3 today if necessary. There may be certain matters that I will
4 need to defer to him on.

5 THE COURT: Okay. That's fine. The plaintiff pro se,
6 Kathleen Arnold, is at the podium, and, I gather, will be
7 entering an appearance. Do you have counsel?

8 MS. ARNOLD: No, sir, I don't. I am entering an
9 appearance, though.

10 THE COURT: Okay. This is a pretrial conference in
11 connection with your adversary proceeding. The debtor has
12 filed a motion to dismiss. That's not being heard today, but
13 you --

14 MS. ARNOLD: I understand that.

15 THE COURT: You'll have an opportunity to respond.
16 The question is whether this is something you can respond to on
17 your own or whether you can obtain pro bono counsel or --

18 MS. ARNOLD: Oh, no. I believe I can respond on my
19 own. Thank you very much.

20 THE COURT: Well, that's not being heard today.

21 MS. ARNOLD: Oh, I'm sorry. Okay.

22 THE COURT: Do you intend to file papers in response?

23 MS. ARNOLD: We're here -- I'm here about the
24 scheduling today. Rule 16.

25 THE COURT: Excuse me?

1 MS. ARNOLD: Rule 16. I'm here about the confirmation
2 position statement, the -- our briefing statements. That's
3 what I'm here about. Pretrial. There are issues that we need
4 to work out.

5 THE COURT: This is a pretrial conference. Nothing
6 substantive is going to --

7 MS. ARNOLD: Right.

8 THE COURT: -- happen.

9 MS. ARNOLD: I understand.

10 THE COURT: But I have looked at the docket, and I see
11 that a motion to dismiss was filed. You're either going to
12 respond to it in writing or you're going to not respond to it.
13 That's your option. Are you going to respond to it?

14 MS. ARNOLD: Well, Your Honor, we're not there yet.
15 I'm sorry. We're not there yet. There are matters that have
16 been pled outside of the complaint, out of the scope of the
17 complaint, and matters in terms of what we're agreeing to and
18 what we would, I mean, if you look at things, and, as you well
19 know, I've brought up, or maybe you don't know. Let me ask you
20 this. I FedEx'd out a package yesterday, a pretrial --
21 pretrial scheduling conference position statements, and I'm
22 wondering if the Court did get those? I FedEx'd them to your
23 office so that they would be here this morning at 8 o'clock.

24 THE COURT: I haven't seen the papers you're referring
25 to.

1 MS. ARNOLD: You have not seen them. Okay. Well, I
2 have an additional copy.

3 MS. ECKOLS: And, Your Honor, the debtors have not
4 seen it either.

5 THE COURT: Well, let me just tell you how we do
6 things here.

7 MS. ARNOLD: Okay. I understand -- yes.

8 THE COURT: And you're representing yourself, and I
9 gather that Mr. Cotten, who is -- you're seated in the
10 courtroom, Mr. Cotten?

11 MR. COTTEN: Yes, sir.

12 THE COURT: DO you want to come forward or are you
13 just going to be listening?

14 MR. COTTEN: Oh, no, I'm fine just with this.

15 THE COURT: Okay. This is a pretrial conference to
16 talk about what happens next.

17 MS. ARNOLD: Yes.

18 THE COURT: And we try to do things with as much order
19 as possible. Papers should not be submitted the day of a
20 hearing or conference. The lawyers for Lehman don't have the
21 papers that you're referring to. I don't have the papers --

22 MS. ARNOLD: Okay.

23 THE COURT: -- that you're referring to. But that's
24 okay, because we're just talking about the case and what
25 happens next. So far you filed an adversary complaint. The

1 debtors have filed a motion to dismiss.

2 MS. ECKOLS: Yes.

3 THE COURT: And what we're going to do is schedule a
4 hearing on the motion to dismiss.

5 MS. ARNOLD: Well, Your Honor, we have unresolved
6 matters. I cannot respond until we resolve these matters. So
7 with regard to the out of complaint matters that were
8 introduced in the complaint, what I would like to see happen is
9 that we at least have a magistrate to hear these matters with
10 regard to the fraudulent removal that I will be bringing up. I
11 mean, there's documents here you don't have, so I've not,
12 basically, briefed anybody on anything.

13 THE COURT: I don't know what you're talking about.

14 MS. ARNOLD: Okay.

15 THE COURT: What are you talking about a magistrate?
16 There are no magistrates in bankruptcy court.

17 MS. ARNOLD: No, well, a magistrate or a fact finder
18 who can find -- identify such things as bar dates and so forth.
19 Statute of limitation dates.

20 THE COURT: Well, let me tell you what you're going to
21 do.

22 MS. ARNOLD: Okay.

23 THE COURT: We're going to have a briefing schedule.
24 I'm going to give you an opportunity to find a lawyer, because
25 you're in an environment where very sophisticated lawyers are

1 representing Lehman and are seeking to dismiss your case. If
2 you don't want a lawyer and want to do this on your own you're
3 going to be held to the same standard as if you had a lawyer,
4 which means you're going to meet the deadlines. You're going
5 to file papers. And if you don't file the papers relief will
6 be entered against you.

7 MS. ARNOLD: I understand.

8 THE COURT: So how much time do you need to file a
9 response to the motion to dismiss?

10 MS. ARNOLD: It's not a matter of responding to the
11 motion to dismiss, Your Honor. It's a matter of resolving the
12 issues that are outside of the complaint that have been raised
13 and --

14 THE COURT: The only matter that is before me --

15 MS. ARNOLD: Okay.

16 THE COURT: -- is the complaint that you have filed --

17 MS. ARNOLD: Okay.

18 THE COURT: -- and a motion to dismiss that complaint.

19 MS. ARNOLD: Okay.

20 THE COURT: Your obligation, if you want to stay in
21 court and be before me, is to deal with the merits of the
22 motion to dismiss.

23 MS. ARNOLD: Okay.

24 THE COURT: If you don't deal with it your complaint
25 will be dismissed.

1 MS. ARNOLD: Okay.

2 THE COURT: How much time do you need?

3 MS. ARNOLD: Twenty days

4 MS. ECKOLS: Your Honor?

5 MS. ARNOLD: The normal time.

6 MS. ECKOLS: The attorneys, actually, the debtors have
7 been working with Ms. Arnold to set up a briefing schedule on
8 the motion to dismiss.

9 THE COURT: And what times have you worked out?

10 MS. ECKOLS: We asked for May 16th as being the
11 deadline for Ms. Arnold to respond to the motion to dismiss,
12 June 16th (sic) the reply date, and, then, June 15th for the
13 hearing on the motion to dismiss.

14 THE COURT: Is that acceptable to you?

15 MS. ARNOLD: What about discovery? What if I raise
16 discovery?

17 THE COURT: There's no discovery.

18 MS. ARNOLD: Okay. Okay.

19 THE COURT: It's a motion to dismiss.

20 MS. ARNOLD: Okay. All right. Fine. That's fine
21 with me.

22 THE COURT: Okay. My suggestion --

23 MS. ARNOLD: Yes?

24 THE COURT: -- is that counsel for the debtors prepare
25 a stipulation that sets forth those dates; that the stipulation

1 be signed by both Kathleen Arnold and Timothy Cotten. I'm
2 going to tell you now that you are in a very difficult
3 environment not to have a lawyer, and if this were one of my
4 individual Chapter 7 cases and an adversary proceeding had come
5 up in the case I would have suggested that you contact one of
6 the agencies in New York that provide pro bono counsel, because
7 you're dealing with some sophisticated legal issues. I can
8 tell from the papers that I've seen that you've been involved
9 in litigation surrounding this question for some time, and you
10 may be a very sophisticated pro se litigant as a result, but
11 you're at a disadvantage in not having a lawyer.

12 MS. ARNOLD: I understand that, Your Honor. And it's
13 not by choice. Obviously, we've had plenty of them over the
14 years, so -- but thank you.

15 THE COURT: Okay. So I'm going to ask counsel for the
16 debtor to develop that stipulation and make sure that it's
17 signed by both of the individual plaintiffs. I'm giving you
18 the admonition that the papers need to be filed and served in
19 accordance with that stipulation --

20 MS. ARNOLD: Okay.

21 THE COURT: -- or there'll be consequences --

22 MS. ARNOLD: I understand.

23 THE COURT: So pay attention to the dates.

24 MS. ARNOLD: Okay. I understand.

25 THE COURT: Okay?

1 MS. ARNOLD: Thank you. Thank you. I have the date.

2 Thank you.

3 MS. ECKOLS: Your Honor, we will do so.

4 THE COURT: Okay. Thank you.

5 MS. ECKOLS: And, if you do not mind, we were asking
6 for Mr. Stewart and Ms. Eckols to be excused from the rest of
7 the hearing.

8 THE COURT: I'm sorry. Who's being excused?

9 MS. ECKOLS: Mr. Stewart and myself, Ms. Eckols.

10 THE COURT: Oh, fine.

11 MS. ECKOLS: Okay.

12 THE COURT: Have a nice afternoon.

13 MS. ECKOLS: Thank you. Bye-bye.

14 THE COURT: Okay. You're excused.

15 MR. BAER: Your Honor, I'm actually here on agenda
16 item number 9, listed in the amended notice of agenda. That
17 matter is Uvino v. Lehman Brothers, et al., which is adversary
18 case number 10-05428, and I am here on behalf of the defendants
19 in support of defendant's motion to dismiss the adversary
20 complaint.

21 MR. ROSEN: Good afternoon, Your Honor. Avrum Rosen,
22 representing Wendy Uvino.

23 THE COURT: Okay.

24 MR. BAER: May I be heard?

25 THE COURT: Sure.

1 MR. BAER: Thank you, Your Honor. Again, good
2 afternoon. My name is Lawrence Baer. I'm with Weil, Gotshal &
3 Manges. I'm here on behalf of the defendants, Lehman Brothers
4 Holdings Inc., Alvarez & Marsal and Robert Hershan, here in
5 support of our motion to dismiss the adversary complaint in
6 this proceeding. Essentially, plaintiff, Wendy Uvino, alleges
7 three causes of action, one for quantum meruit, the second
8 cause of action for constructive discharge, and she had a third
9 cause of action for hostile work environment, which was
10 voluntarily dismissed following the filing of defendant's
11 motion to dismiss, and that dismissal was so ordered by the
12 Court last month, March 22nd.

13 Briefly, Your Honor, if I may, I'll give a brief
14 recitation of the facts which are set forth in the complaint
15 and not in dispute.

16 THE COURT: You actually don't have to do that. I've
17 reviewed the papers and I'm familiar with the facts that are
18 alleged.

19 MR. BAER: Okay. Well, then, I'll move straight to my
20 argument. Essentially, Your Honor, Ms. Uvino, who was party to
21 a valid post-petition employment agreement labeled a commitment
22 letter, now seeks to rewrite the terms of that commitment
23 letter because she was dissatisfied with the compensation that
24 she received under a quantum meruit theory. It's well
25 established, as we've set forth in our papers, under New York

1 law, that a valid enforceable written employment agreement
2 covering the particular subject matter will preclude a quantum
3 meruit theory of recovery, and, certainly, with respect to the
4 period October, 2008, just after the filing of the petition,
5 through December 31, 2009 there is no issue that Ms. Uvino was
6 party to a commitment letter.

7 Subsequent to the expiration of the commitment letter,
8 which, as I mentioned, expired December 31, 2009, Ms. Uvino
9 continued to work for the debtor. She had been offered a
10 renewal commitment letter for a twelve month period. There is
11 some dispute as to what, exactly, happened, but for purposes of
12 this motion she's alleged that she didn't sign the agreement
13 and, so, that no valid agreement exists with respect to that
14 period. So there may be an issue, Your Honor, with respect to
15 the period between January and June, 2010, but there is
16 absolutely no issue whatsoever with respect to the period
17 October through December of 2009.

18 THE COURT: I just want to see what you meant by what
19 you just said.

20 MR. BAER: Yes.

21 THE COURT: You said there may be an issue. You're
22 saying that there may be a quantum meruit issue as to the
23 period where she worked without a signed commitment letter?

24 MR. BAER: Well, certainly on the face of the
25 complaint there may be an issue as to that. Discovery may show

1 that there was, in fact, a valid agreement. Our position at
2 this point is that she was working under the agreement. She
3 continued to provide services under the agreement, and she
4 alleges, in fact, in her complaint that she worked, continued
5 to work for the debtor under the terms provided in the renewal
6 commitment letter. So she didn't --

7 THE COURT: I just want to understand what this means.

8 MR. BAER: She didn't execute it.

9 THE COURT: I just want to understand what this means
10 for purposes of the motion to dismiss.

11 MR. BAER: Yes.

12 THE COURT: Are you saying that the motion to dismiss
13 is limited to the period during which she worked under the
14 signed commitment letter and doesn't extend to the period
15 thereafter when is the unsigned document?

16 MR. BAER: Your Honor, forgive me for confusing the
17 issue, but it is as a result of the way the matter is pled.
18 The matter is pled to include the commitment letter and the
19 renewal commitment letter without distinction. To the extent
20 that the plaintiff is alleging that this is all one period
21 covered by an extant agreement then the motion to dismiss
22 extends to the entire period of time. To the extent that the
23 plaintiff, Ms. Uvino, seeks to parse this out between the
24 period of the original commitment letter and the renewal
25 commitment letter, there could be an issue for purposes of the

1 motion to dismiss, at least on the face of the pleading, as to
2 whether or not there is any colorable claim for that period of
3 time.

4 Secondly, Ms. Uvino alleges a cause of action for
5 constructive discharge. Essentially, it's a freestanding
6 action for constructive discharge not tied to any particular
7 underlying obligation. It is well established in New York that
8 there is no independent cause of action for constructive
9 discharge. In papers submitted in opposition to our motion,
10 Your Honor, Ms. Uvino relies on a series of cases out of the
11 State of Connecticut alleging a public policy exception to the
12 normal at-will employment rules governing at-will employees.
13 The contract between Lehman Brothers Holdings and Ms. Uvino was
14 made in New York. It was performed in New York, and New York
15 law governs. There's absolutely no basis for reliance on
16 Connecticut state law in support of this constructive discharge
17 claim. So for that reason alone the absence of any underlying
18 legal basis for assertion of an independent cause of action for
19 constructive discharge, that cause of action should be
20 dismissed.

21 Assuming that that might survive, somehow, on legal
22 grounds, the facts as pled, which we, again, we assume to be
23 true for purposes of this motion, are that Mr. Hershan ignored
24 Ms. Uvino. Mr. Hershan funneled communications through a
25 junior associate with Ms. Uvino. Mr. Hershan was too busy to

1 deal with Ms. Uvino directly and that when he did he did
2 interact with her in a distinctively hostile manner.

3 Your Honor, the law is very clear in the area of
4 constructive discharge that constructive discharge can only be
5 established where conduct is alleged that is so egregious and
6 so outrageous that no reasonable person would continue to be
7 employed under those circumstances. The allegations, assuming
8 everything is true, set forth in the complaint fall far short
9 of that stringent standard for the establishment of
10 constructive discharge. So for the additional reason the
11 second cause of action should be dismissed.

12 As I noted at the outset the third cause of action,
13 which was for hostile work environment, was voluntarily
14 dismissed. However, in the papers submitted in opposition to
15 our motion to dismiss plaintiff has proposed adding a new third
16 cause of action and has moved for permission, the Court's
17 permission, to file an amended complaint. That proposed third
18 cause of action and leave to file the amended complaint, Your
19 Honor, respectfully -- we respectfully submit should be denied.

20 THE COURT: Let me just ask you procedurally
21 something.

22 MR. BAER: Yes.

23 THE COURT: In effect, this is a preemptive motion to
24 dismiss a count which hasn't yet been lodged as part of an
25 amended complaint.

1 MR. BAER: Your Honor, as plaintiff acknowledges, the
2 leave to amend the complaint should be denied when the
3 amendment would be futile. We have addressed the proposed
4 amendment in our papers to demonstrate that the amendment is,
5 in fact, futile.

6 THE COURT: I'm just dealing with a very, very narrow
7 procedural question, and it may be that the parties have agreed
8 that the motion to dismiss that we're now hearing should extend
9 to Count 3. I want to be clear that this is ripe at the moment
10 for adjudication. In effect, you're preemptively seeking to
11 block the filing of an amended complaint that includes Count 3
12 on the grounds that Count 3 could not be setting forth
13 cognizable relief as a matter of law, and, so, leave should not
14 be granted because it would be futile to do that. My question
15 is whether that's ripe for adjudication now.

16 MR. BAER: Your Honor, the only issue that is ripe for
17 adjudication is whether or not plaintiff should be granted
18 leave to amend. I've attempted to address that question by
19 arguing that such an amendment would be futile. In order to
20 actually address the underlying issues as to futility I did
21 argue that -- I did argue the substance of the law surrounding
22 the proposed third cause of action, so that Your Honor is quite
23 right that the issues that are being addressed by defendants
24 here today are, in fact, the very same issues that would be
25 addressed were the Court to grant leave to amend the complaint

1 and were the proposed cause of action, as set forth in the
2 proposed amended complaint, were filed. It may be expeditious,
3 Your Honor, at this time, particularly if plaintiff's counsel
4 would consent to that procedure, to address the matter, but I
5 certainly believe that procedurally, today, as we stand here
6 today, the posture is such that the Court -- the issue of
7 futility is ripe for adjudication.

8 THE COURT: I'll hear what you have to say.

9 MR. BAER: Thank you, Your Honor. The third cause of
10 action, the proposed third cause of action, is a cause of
11 action for breach of the implied covenant of good faith and
12 fair dealing which is embedded in contracts in the State of New
13 York. The plaintiff, in particular, relies on the commitment
14 letter, the renewal commitment letter, and this Court's
15 retention order in support of its claim for breach of the
16 covenant of good faith and fair dealing.

17 It's well established under New York law that a breach
18 of the covenant of good faith and fair dealing cannot be used
19 as a surrogate, if you will, for a breach of contract claim.
20 If there is no underlying breach of contract there is,
21 necessarily, no breach of the implied covenant of good faith
22 and fair dealing.

23 So let me parse this out, if I may, in accordance with
24 the way the plaintiff has pled the mater. With respect to the
25 commitment letter there's absolutely no allegation that the

1 defendants did, or that LBHI, in particular, did not live up to
2 its commitments. It paid Ms. Uvino exactly what the commitment
3 letter called for. In fact, she was awarded the maximum
4 possible bonus compensation that she could have received under
5 that commitment letter. So there's no underlying breach, and
6 there is no breach of the implied covenant of good faith and
7 fair dealing.

8 Again, this is an effort by Ms. Uvino to rewrite the
9 terms of the agreement because she was dissatisfied with the
10 terms of her compensation.

11 THE COURT: But aren't you assuming away something?
12 There was a handwritten notation in the original commitment
13 letter that apparently reflected the course of dealing leading
14 up to the execution of the document and suggesting that this
15 employee had an expectation that she'd be subjected to a
16 performance review early in the process that would lead to
17 greater compensation. So, fairly read, I think the complaint
18 suggests that there was, at least, a breach of that
19 understanding.

20 MR. BAER: Your Honor, the handwritten notation to
21 which you refer is set forth on the last page of the commitment
22 letter, which is attached as Exhibit C to the complaint. The
23 amendment reads, and I quote, the handwritten amendment, "The
24 parties agree to engage in a performance review no later than
25 June 30, 2009 for consideration of a potential increase in

1 bonus potential".

2 THE COURT: So, presumably, looking at that most
3 favorably to the plaintiff, she had an expectation, based upon
4 that notation and, presumably, also based upon the
5 conversations that preceded the notation, that even though she
6 was signing onto a bonus program that she thought was less than
7 fair from her perspective that she was going to have an
8 opportunity to reengage the compensation process early on.

9 MR. BAER: Yes, Your Honor. And, in fact, the
10 complaint and the attached documents to the complaint confirm
11 that that, in fact, did happen. Exhibit D to the complaint is
12 an e-mail exchange between Ms. Uvino and Mr. Hershan in March
13 of 2009, just three months into the year and -- so five months
14 after the commitment letter was signed -- in which Ms. Uvino
15 does, in fact, raise issues related to her compensation and
16 makes arguments in favor of her position that she should be
17 paid more. And Mr. Hershan responds by saying the matter is,
18 in fact, under review. The allegations of the complaint
19 further expand on this that there were discussions ongoing
20 throughout 2009 where the issue of compensation was raised. In
21 fact, there was also a performance review completed, a formal
22 performance review completed for Ms. Uvino, and the outcome of
23 all of that is the offering to Ms. Uvino of the renewal
24 commitment letter, which kept base salary at the 240,000 dollar
25 per annum level and provided an opportunity for a bonus that

1 was increased by 10 percent, from 200,000 dollars a year,
2 20,000 dollars annually, to 220,000 dollars. That was
3 consistent with Your Honor's order, by the way, in the
4 retention program that such a ten percent increase in bonus
5 potential could be provided.

6 The fact of the matter is the handwritten amendment
7 was, in fact, complied with. The handwritten amendment says
8 we'll revisit the subject. We'll talk about the potential for
9 increased bonus compensation or increased bonus potential.
10 There was never an agreement that you will receive an increase
11 upon a review, and there's no dispute as to that. These are
12 documents attached to the pleading, and, so, they're fairly
13 before the Court on this motion. And, so, whatever her
14 expectations were, certainly as to the contractual commitments
15 they were met, and that's clear from the face of the documents.
16 Ms. Uvino's subjective belief that that review as to a
17 potential increase in bonus potential might, actually, result
18 in an increase in bonus, is really not at issue here. What's
19 at issue here are the writings and the terms of the commitment
20 letter.

21 THE COURT: I hear what you're saying, but it seems to
22 me that part of what's embedded in the plaintiff's complaint is
23 that she was induced to work relying upon the expectation that
24 that performance review would result in a bonus increase.

25 MR. BAER: Your Honor, that may be her subjective

1 expectation. If one looks at the document itself it's very
2 clear that there would be a performance review that would
3 consider the potential increase in bonus potential. Those are
4 the exact words of the document. The document also contains a
5 fairly standard zipper or integration clause that provides that
6 the letter represents the complete agreement between you, Ms.
7 Uvino, and LBHI with respect to your compensation and other
8 matters addressed in this letter and that this letter replaces
9 any prior written or oral agreements or understandings.

10 Whatever Ms. Uvino might have subjectively believed is
11 really of no moment for purposes of this motion, because the
12 words here quite clearly establish that the only thing that was
13 going to happen was that there was going to be a conversation
14 sometime on or before the middle of 2009 during which there
15 would be consideration of a potential increase in bonus
16 potential. I mean, it's potential potential. It's a double
17 potential. It's quite indefinite, Your Honor. I don't mean to
18 be glib or flippant about it, but it is by no means an
19 agreement to increase compensation that anyone can reasonably
20 rely on.

21 THE COURT: Well, it's true that it's not an agreement
22 but it -- the fact that it was handwritten in, in a somewhat
23 informal way, suggests that it was a last minute inducement to
24 get her to work and I don't know what discovery would show as
25 to that or how this handwriting came to be or what others, like

1 Mr. Hirshon, would say went on between the parties as they
2 wrote something extra into the first commitment letter.

3 MR. BAER: Your Honor, paragraph 10 of the commitment
4 letter, which I just read into the record, it makes it quite
5 clear that whatever those conversations may have been they are
6 irrelevant because the understanding, express understandings
7 and their only enforceable understandings are the
8 understandings set forth in this document.

9 THE COURT: What if the document included that
10 integration clause and there was this handwritten note with the
11 very same words that was stapled to the back of it instead of
12 written into it? They're the same words at the same time.
13 It's not at all clear to me that the integration clause covers
14 something that may have been written into the document after
15 that clause was typed into the piece of paper.

16 It's a standard form commitment letter that I gather
17 was used countless times with employees hired by LBHI. But
18 this is an extra added attraction. It's -- the handwriting
19 that I'm focused on, in part because it's not clear to me that
20 there's no basis for the plaintiff to make a claim based upon a
21 breach of the implied covenant of good faith and fair dealing
22 as it relates to that line.

23 MR. BAER: Your Honor, the fact that the letter may
24 have been typed before the handwriting appeared on it should
25 not be dispositive to this Court. The fact of the matter is

1 that before Ms. Uvino placed her signature on the very same
2 page that the integration clause appears, subsequent to the
3 writing of the handwritten notation, is what should be
4 dispositive to this Court.

5 It is clear that based upon the documents attached to
6 the complaint that the parties lived up to the obligations set
7 forth in that handwritten sentence, which is to have a review
8 process during which there was a consideration of a potential
9 increase in bonus potential. This is, by no means, a
10 definitive agreement that your compensation will be increased
11 as a result of that review. The documents show an exchange,
12 show a give and take and the allegations set forth in the
13 complaint certainly show a give and take of discussions where
14 Ms. Uvino pled her case, if you will, for increased
15 compensation. And Mr. Hirshon, and others responsible at the
16 debtors, did not accede to the request other than to provide a
17 ten percent increase in bonus opportunity for the coming
18 commitment period, and that's with respect to the letter that
19 was not signed.

20 If I may move on to the other bases for the breach of
21 the covenant, the implied covenant of good faith and fair
22 dealing. Ms. Uvino also relies on the renewal commitment
23 letter for her breach of the implied covenant of good faith and
24 fair dealing. The covenant only applies in connection with
25 contractual agreements.

1 On the one hand, with respect to her first cause of
2 action for quantum meruit, well she says I can pursue that
3 because that really wasn't a valid and binding agreement, I
4 never signed it. On the other hand, with respect to the breach
5 of the covenant of good faith and fair dealing, she's claiming
6 that the terms of the renewal commitment letter were breached,
7 or the implied terms of the covenant of good faith and fair
8 dealing under the renewal commitment letter were breached.

9 In the absence of a binding, contractual agreement,
10 that's just not a cause of action that would survive any motion
11 to dismiss. There's no cause of action in the absence of an
12 agreement.

13 The same argument, Your Honor, could be made and we
14 are asserting the same argument with respect to the retention
15 order, this Court's retention order. That is not a contractual
16 commitment between plaintiff and LBHI; it's an order of the
17 court. The law's clear that that does not create a contractual
18 commitment. And so any violation of the implied covenant of
19 good faith and fair dealing that -- for allegedly violating the
20 terms of that order, just, you know, is without basis in law
21 because there is no underlying contractual obligation.

22 The facts underlying that particular alleged breach,
23 again are constructive discharge. So to the -- so for the
24 additional reason that the conduct alleged, which falls far
25 short of the very high standard for establishing constructive

1 discharge as a matter of law, makes that particular aspect of
2 the proposed third cause of action also dismissible for that
3 additional reason.

4 Finally, I just would like to address the impropriety
5 of including the nondebtor defendants in this matter. With
6 respect to the quantum meruit claim, the only party alleged is
7 LBHI and that is appropriate. With respect to the constructive
8 discharge claim, the -- that's alleged against LBHI, Alvarez &
9 Marsal and Robert Hirshon to the extent that that second cause
10 of action seeks to rely on breach of -- first of all, there's
11 no free-standing cause of action for constructive discharge.
12 Secondly, to the extent that it seeks to rely on the contract,
13 the contract wasn't between Alvarez & Marsal, Robert Hirshon
14 and Ms. Uvino, the contract was between LBHI and Ms. Uvino. So
15 they're not properly pled as to that cause of action.

16 Similarly, with respect to the proposed third cause of
17 action, which clearly relies on the commitment letter, the
18 renewal commitment letter and this Court's order, there's no
19 privity of contract between Alvarez & Marsal and Robert Hirshon
20 and Ms. Uvino. So for those reasons, to the extent any of this
21 survives, the only defendants in this matter should be LBHI and
22 not A&M and not Mr. Hirshon. Thank you, Your Honor.

23 THE COURT: Okay. Thanks.

24 MR. ROSEN: May I, Your Honor?

25 THE COURT: Sure.

1 MR. ROSEN: Your Honor, let me start with your
2 comments and with the language in the agreement. On a factual
3 basis I have large disputes with most of what was said. There
4 was a clear breach of that agreement.

5 That agreement called for a performance review by June
6 30th of 2009, it never happened. You have the e-mail from my
7 client in August of 2009 asking what's going on. The real
8 conversations about remuneration didn't happen until January of
9 the next year. She doesn't get her performance review until
10 November, when everybody got them. So they completely ignored
11 that provision of the contract. They said, yeah we'll look
12 into it but they didn't look into it, they didn't sit down with
13 her and they didn't do the review. And it's admitted that they
14 didn't do the review because the review's not done until
15 November.

16 So in point of fact, there was a breach of that
17 agreement by Lehman Brothers, at the very least there were two
18 possible dates for that breach. One is at the beginning of
19 that agreement because when they induced her to sign that
20 agreement they had no intent to perform. That's something that
21 discovery will bring out.

22 Secondly, clearly as of June 30th they were in breach
23 of that agreement and she was entitled to whatever her remedies
24 were. For them to rely on that agreement and say because
25 there's a contract for the first eighteen months, so you cannot

1 have a quantum meruit claim because it's governed by the
2 contract, when they ignore the one provision that was in that
3 agreement to up her compensation is ludicrous and I think you
4 focused in on the issues of what went on in the negotiation.

5 And there's more to it, Your Honor, because, and it's
6 something that's completely missed in their papers and they
7 don't talk about it, we cite the cases in. These people were
8 court retained by this Court. This Court, under your retention
9 order always has the jurisdiction and the ability to assess
10 quantum meruit for an administrative claim against this estate.

11 You retain that jurisdiction in that order and you
12 still, to this day, have that jurisdiction in there. And
13 interestingly enough here, that provision that they handwrote
14 in, if you read your order, since they were varying the process
15 and remember they gave it to her two or three weeks before they
16 made the motion. They gave it to her on October 16th; motion
17 isn't dated till October 28th. I'm not quite sure when it was
18 heard and actually no one attached it, and I'm equally at fault
19 for this, a signed copy of the order, just the proposed order.
20 Let's assume it was entered a month or so thereafter.

21 So at the time they were queuing all this up and they
22 did everything, they knew that they were varying her agreement.
23 She didn't know it yet because she hadn't seen the motion or
24 the order, I assume it was being drafted at that point. And
25 they had to -- under that order they had to go back to the

1 creditors' committee and get approval to vary anything.

2 Now, I don't know if they ever talked to the
3 creditors' committee, that's something that would come out. I
4 don't know if the creditors' committee knew about this or said
5 yes or no to it. I don't know what happened there and one of
6 the things that should have happened on that performance review
7 is if they were looking at and they really were making
8 decisions, at some point they should have either, because they
9 had this provision obligating them to do that, it should have
10 been discussed with the creditors' committee. And discovery
11 will show whether or not they had engaged in any good faith to
12 go through that process.

13 And Your Honor, when the performance review comes down
14 in November, six months late, what does it say? Excellent.
15 Excellent. And when you look at the job description, but -- it
16 wasn't -- so she was induced, and this is part of her damages,
17 she wanted to know in June of 2009 what was going to happen
18 with her. So by them -- I won't use any colloquialisms but by
19 them holding off and not letting her know until January of next
20 year when they were doing, she lost six months in the job
21 market. I mean, she was entitled -- this was a retention
22 program, she had bargained to know at some point at an earlier
23 date what was going to happen with her and they ignored that
24 and didn't give it to her and she lost six months out of her
25 life working there when she could have been out looking in the

1 job market. And that was a time when you needed the time to
2 look in the job market instead of waiting until January. So
3 right then and there they were in breach and she's damaged from
4 that and she's entitled to a review and a quantum meruit claim
5 on that.

6 Your Honor, in addition --

7 THE COURT: Let me break in and ask you a question.

8 MR. ROSEN: Sure.

9 THE COURT: Because I'm feeling that a lot of what
10 you're saying crosses the border into the land of speculation.
11 If she'd had a performance review in June and the review was
12 the same review that she had six months later, in other words
13 excellent, there was also no obligation to increase her bonus
14 compensation. Excellent but we're in bankruptcy, we have to
15 guard our dollars for the benefit of creditors, we can't give
16 you a bonus but we appreciate all the good work you've done.
17 Let's just say that happened.

18 MR. ROSEN: Her answer would have been, Your Honor, as
19 we allege in the complaint, they told her that in the beginning
20 and then they went back and rehired where they had given her a
21 cut in -- where they had promoted her, gave her more
22 responsibilities, given her a cut in pay, they were then going
23 out and rehiring old Lehman people at their old salaries plus
24 giving them bonuses. And she would have had an argument under
25 good faith and everything else that you're not dealing with me

1 fairly, you're dealing with me differently than you're dealing
2 with all the other Lehman employees. Or she could have walked
3 at that point because she would have known.

4 THE COURT: Well whether she could have walked or not
5 it's still speculation as to what she would have done or could
6 have done.

7 MR. ROSEN: But the speculation is caused by their
8 breach not by hers, Your Honor. And she had a bargained-for
9 provision and they took that away from her. So whatever -- for
10 us to say would have, could have, we don't know, that
11 uncertainty is caused by them breaching something that she
12 bargained to get.

13 THE COURT: Couldn't she just as easily, July 1 of
14 that year, said I never got my performance review; I don't like
15 working here; you breached my agreement; I'm going out into the
16 job market.

17 MR. ROSEN: Because they kept her dangling, Your
18 Honor.

19 THE COURT: Excuse me?

20 MR. ROSEN: Because they kept her dangling. She could
21 have but she had a contractual right to that. Anybody can
22 always do that. They can always give up their rights and walk
23 away.

24 THE COURT: Well, it seems to me it's a breach of a
25 covenant that doesn't have any teeth in it because, and I'm

1 just doing to you what I did to your adversary.

2 MR. ROSEN: I fully expect it, Your Honor.

3 THE COURT: You have --

4 MR. ROSEN: I've been before you enough.

5 THE COURT: You have a handwritten little notation but
6 it doesn't offer any binding and enforceable rights.

7 MR. ROSEN: Well Your Honor, there is always -- but
8 you get into the -- it is ambiguous and you get into the parole
9 evidence rule and you get into everything you talked about.
10 And let's not forget something; this is a motion to dismiss.
11 This isn't a motion for summary judgment. My allegations have
12 to be accepted as true for the purposes of what went on here,
13 all right. And the fact of the matter is there is no doubt
14 that we have alleged a breach and that they do not deny,
15 anywhere in their papers, that there was a breach of that
16 provision.

17 What flows from that breach, what went into it, what
18 the intent was, all right, what was involved in it, what my
19 options were, those are matters for discovery to be flushed out
20 further down the line, not to be dealt with on a motion to
21 dismiss, because I don't know what they did and why they did it
22 because I'm on the outside. And that's why you have discovery,
23 to find out what really went on here. That's the answer I have
24 to your question, Your Honor.

25 THE COURT: Okay.

1 MR. ROSEN: Okay. And Your Honor, you know, in all of
2 the cases -- and then the straight issue of her benefit to the
3 estate. Let's not forget who this person was, all right. When
4 they hired her, and this is something that will also come out,
5 they didn't tell her that they were about to hire 480 more
6 people. They had the 240, they had the 145, they hired her for
7 her provision, they kept that under wraps and then they almost
8 tripled the number of people that she was dealing with.

9 So even under your order, Your Honor, there would be
10 the argument that there was a substantial change in her job
11 position that she was entitled to increased compensation for to
12 come back. And she would have that claim independent of the
13 agreement because they changed her job description. And
14 discovery would bear out that they did not let her know about
15 that before she signed this agreement. She didn't find out
16 about it until after it was approved by the court and they
17 said, by the way you're hiring, training and involving 480 to
18 500 more people for the same salary that we promised you, which
19 is less than you were making before. So there was that issue.

20 Then there was also -- and Your Honor all of the cases
21 in the Southern District of New York that have dealt with
22 quantum meruit have gotten to the merits, even the ones where
23 we lost. You've got the Ralph Lauren case, you even have the
24 Enron case where Judge Gonzales went through all the factors,
25 found that the person who left had violated the stay because it

1 was a pre-petition employment agreement but still went through
2 what benefit that person had conveyed to the estate and made
3 the determination on that basis and my client's entitled to
4 that. Even if there were -- especially if there's a breach
5 under the contract they admit that she's entitled to it for the
6 six months when there is no contract that she worked because
7 she was not governed by that agreement. They can't have their
8 cake and eat it too. They can't say well there was no -- we
9 can't be in breach of a good faith covenant when there was no
10 contract in effect and then say but we're holding you to the
11 terms of the contract.

12 So during that period you've got to deal with and I
13 think, at the very least, from the time they breached on her
14 performance review, you get to look at that period also. And
15 she'll be happy. You'll remember she was a defendant; she was
16 also the head of the employee benefits fund. She was a
17 defendant in, I think, a forty million dollar lawsuit. Mean,
18 this is somebody who was front and center on the reorganization
19 of this. And part of what happened in January, to get to the
20 constructive discharge allegations, you know, what constitutes
21 a hostile work environment changes a lot on the job. If you're
22 the head of HR for Lehman Brothers and you are completely
23 ignored by the person running the company and publicly
24 chastised in front of other people, your authority -- it
25 doesn't take very much to completely undermine your authority

1 to do your job.

2 And when you give advise, as we allege in the
3 complaint, that they can't do certain things to employees under
4 the law and the person wants to do it and then you're berated
5 for it, it destroys your -- it really does destroy your ability
6 to do your job. And, you know, I've known Wendy Uvino for a
7 long time now, she's incredibly competent, she's very thorough
8 and she's got a problem not being permitted to do her job as
9 she sees fit. And, you know, she stood by this company through
10 a lot in terms of that, including being wiped out personally.
11 I mean, I'm here as her individual Chapter 11 attorney because
12 they were ruined by this case and going forward.

13 Your Honor, moving forward on the other claims, I do
14 not agree, procedurally, to answer your procedural question,
15 that the dismissal of our proposed amended complaint is right.
16 Just on a procedural basis I do not have a right to reply. We
17 made that motion, they -- in our responsive papers we raised it
18 on that they put in, under the briefing schedule, they put in
19 the other documents. I think you've raised, for the issues
20 also, there are underlying issues but that motion, I don't
21 think in terms of a dismissal of that, has ever been fully
22 briefed the way it should be for due process concerns and being
23 in front of this Court. I do not think it's right.

24 Well, just so we can treat this as a complete
25 package --

1 MR. ROSEN: Yes, Your Honor.

2 THE COURT: -- how much time do you need to file a
3 supplemental brief, if you choose to do that? Or is it your
4 position that everything raised in the reply papers as to Count
5 III should simply be disregarded until such time as there is a
6 separate hearing in connection with your motion for leave to
7 amend to add Count III?

8 We're all here, it just seems to me that it makes
9 sense to streamline this and treat this as one argument
10 regarding the sufficiency of your complaint and the content of
11 your complaint. And that if you need more time to submit a
12 supplemental --

13 MR. ROSEN: Your Honor --

14 THE COURT: -- brief, you can do that.

15 MR. ROSEN: -- I think we're here. I don't want to
16 cost this estate more money and I don't want to cost my estate
17 more money and you certainly have enough to do with this case
18 that I think that we can deal with all today. I think the
19 issues are all before you and I think, you know, whether you
20 agree with me or the other side we won't know until you rule;
21 you've got the arguments on that.

22 THE COURT: I'm just wondering whether or not you want
23 an opportunity to file anything that you haven't already filed?

24 MR. ROSEN: No, not that I haven't filed and I think I
25 haven't said, Your Honor.

1 THE COURT: Okay.

2 MR. ROSEN: Let me, one second, make sure that I've
3 covered everything, Your Honor.

4 Your Honor, the other issue that I have that goes to
5 the third cause of complaint, and it goes towards -- it goes
6 towards the amended complaint, since we're on that, in terms of
7 the fair -- the duty of fair dealing. I think there's a higher
8 duty here and I think there's a higher policy issue. I taught
9 in law school and I've had to argue -- you know, if you had to
10 argue policy issues you're in trouble but I think in this case
11 it really is important.

12 These are court retained professionals hired by a
13 turnaround firm to come in and I think there is a higher
14 duty -- he keeps referring back to New York law and other
15 matters, there have been a lot of bankruptcy cases that deal
16 with the bankruptcy professionals and the fact of the matter is
17 people who are going to come in to these cases, especially
18 prior employees, have to know that they're going to be dealt
19 with fairly.

20 Going back to your issue, the kind of so what
21 argument, on the language in the order -- I mean the language
22 in the agreement that said well they didn't have to agree to
23 anything, they could have said so what. That's not the way a
24 fiduciary to the estate should work.

25 Yes, you've got a fiduciary duty to the creditors.

1 Yes, you've got a fiduciary duty to administrative creditors
2 but you also have a fiduciary duty and the Court, because
3 you're working under the ages of the court, you've got a duty
4 to deal fairly with the estate professionals that are doing the
5 work. And to induce someone to sign on and to stay with the
6 inference -- the only inference you can draw from that is that
7 we're going to review you six months and if you do something
8 good in six months, all right, then we're going to give you
9 more money.

10 My client wouldn't have bargained for that, to say
11 okay you do a great job -- we're going to tell you you do a
12 great job and we're going to pat you on the head and say good
13 now go do it again for more. That's not the expectation raised
14 by that agreement, then there would be no need to have put that
15 into an agreement and once it was in I think they had an
16 obligation to go forward and deal with my client in good faith.
17 And we allege, and I think we've alleged it sufficiently for
18 purposes of a motion to dismiss, that they breached that duty.
19 And that's something that needs to be -- and I think it goes,
20 you know, a little bit beyond this case, it's kind of a message
21 in terms of how do you deal with estate professionals. Thank
22 you, Your Honor, unless you have any questions.

23 THE COURT: Okay. Thank you.

24 MR. BAER: Your Honor, may I be heard in rebuttal?

25 THE COURT: Sure.

1 MR. BAER: First of all, Ms. Uvino's counsel -- I'll
2 try to be brief, just hit a couple of points. Ms. Uvino's
3 counsel talks about or alleges that Lehman never intended to
4 honor the terms of that agreement when it entered into it.

5 Respectfully, the cause of action -- the cause of
6 action on the contract is one for quantum meruit; it's not for
7 fraudulent inducement. The -- so to the -- Lehman's
8 representations and subjective intent and all the rest have --
9 are really not pled in this complaint and are not subject to
10 the motion to dismiss.

11 The point raised by counsel that this court retain
12 jurisdiction, on a quantum meruit basis, to recalibrate Ms.
13 Uvino's salary at any time under the terms of the retention
14 order are just patently false. The fact of the matter is the
15 retention order gave Lehman the authority to enter into an
16 agreement, which is did with Ms. Uvino. The terms of the
17 agreement establish the terms and conditions of employment and
18 this Court did not retain jurisdiction in its order to deal
19 with any disgruntled employee who felt well, you know, I really
20 wasn't paid enough so I'm going to go back to Judge Peck and
21 see if I can get a little more. That's not what this Court's
22 retention order provided.

23 With respect to the quantum meruit decisions that
24 counsel refers to, the Ralph Lauren decision, the Enron
25 decision, in which I was personally involved, those issues --

1 those quantum meruit issues involved employment agreements that
2 had not been assumed by the debtor. Those were prepetition
3 agreements that were not yet assumed so they weren't valid,
4 extant, contractual obligations. Those contracts were looked
5 to by the Court as a measure of value because the parties,
6 prior to the bankruptcy petition, had agreed to terms and
7 conditions of compensation that arguably establish the value of
8 the employment relationship. So quantum meruit in those cases
9 did not involve valid, binding and existing agreements. Here
10 there's no dispute, the commitment letter's a post-petition,
11 valid, binding contractual agreement and quantum meruit is not
12 available as a remedy in such a -- where such a contract
13 exists.

14 With respect to constructive discharge, Mr. --
15 plaintiff's counsel has alleged that there was a hostile work
16 environment. First of all, he's dropped that claim. Second of
17 all, he said -- I think he used the word berate. Nowhere,
18 nowhere in the complaint will you find berate. You'll find
19 conduct alleged to have been -- that she was ignored, that
20 communications were funneled through an associate. That Mr.
21 Hirshon was too busy to deal with her; priorities and that when
22 he responded to her he was distinctively hostile. Those do not
23 amount to berating Ms. Uvino. Nowhere in the pleading does it
24 say that she was berated.

25 Finally I would just like to address the so-called

1 policy issue raised by plaintiff's counsel. Respectfully, Your
2 Honor, what plaintiff's counsel is asking you to do is create
3 new law in the state of New York.

4 The law in the State of New York is well established
5 by the decisions of the highest court in the State of New York,
6 that there is no tort for abusive discharge, there is no cause
7 of action for abusive discharge, there is no implied contract
8 or no implied obligation of good faith and fair dealing with
9 respect to employees at will. And that is exactly what
10 plaintiff's counsel is asking you to do, is to create that
11 obligation.

12 The court of appeals, itself, has refrained from
13 creating that obligation expressly stating in its many
14 decisions that were the employment at will rule to be so
15 modified, that would be a job for the New York State
16 Legislature.

17 Finally, with respect to fiduciary duties raised, the
18 argument regarding fiduciary duties; plaintiff's counsel is,
19 again, just simply wrong. There is no fiduciary duty embedded
20 in the commitment letter here and there is no fiduciary duty
21 that runs from the bankruptcy professionals to Ms. Uvino under
22 the terms of the operative documents. So again, I think
23 plaintiff's counsel is off base on those.

24 Finally, with respect to the issue of the motion to
25 amend; it appears that plaintiff's counsel has consented that

1 all matters should be joined so that the Court could properly
2 consider the underlying merits of our arguments addressing the
3 proposed, third cause of action. Thank you, Your Honor.

4 MR. ROSEN: One point, Your Honor.

5 THE COURT: Okay.

6 MR. ROSEN: I'm assuming this is in the signed order,
7 the last paragraph of the retention order says that "This Court
8 shall retain jurisdiction to hear and determine all matters
9 arising from or related to the implementation of the retention
10 recruitment program or disputes arising under individual
11 employment agreements". Thank you, Your Honor.

12 THE COURT: Okay. I'm going to take this under
13 advisement. I am concerned about the handwritten notation in
14 the initial letter and it would appear that even the debtor
15 acknowledges that there is at least some room for quantum
16 meruit with respect to the unsigned letter. It's a question of
17 parsing the period applicable to quantum meruit analysis.

18 I'm frankly concerned that Mr. Hirshon and Alvarez &
19 Marsal are defendants in this matter and I don't understand why
20 the parties can't meet and confer while this is pending, to
21 consider dropping them from the litigation. I don't know why
22 they need to be in the litigation inasmuch as the claim is a
23 claim against LBHI.

24 While you're involved in meeting and conferring with
25 respect to that procedural question, it seems to me that this

1 is a matter that might be constructively discussed on the
2 merits as well. Both parties are spending significant legal
3 fees in the pursuit of something which I described earlier as
4 speculative. I believe it is. That doesn't mean that it's not
5 provable at some level.

6 So with those comments, I'm going to suggest that the
7 parties talk with each other and I'll consider what I'm going
8 to do in terms of the pending motion. I'm treating the motion
9 to amend in conjunction with the motion to dismiss as either a
10 motion to dismiss the third count if I were to grant to leave
11 to amend or a pre-emptive request that the motion to amend be
12 denied on grounds of futility.

13 And we're adjourned.

14 MR. BAER: Thank you, Your Honor.

15 MR. ROSEN: Thank you very much, Your Honor.

16 (Whereupon these proceedings were concluded at 3:22 p.m.)
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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB
AAERT Certified Electronic Transcriber (CET**D-486)

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Date: April 15, 2011